IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs September 16, 2008

STATE OF TENNESSEE v. RANDY LEE OWNBY

Direct Appeal from the Circuit Court for Marshall County
No. 17288 Robert Crigler, Judge

No. M2007-01367-CCA-R3-CD - Filed January 14, 2009

The defendant, Randy Lee Ownby, was convicted of two counts of aggravated child abuse, Class A felonies, and two counts of child abuse, Class D felonies. The defendant's child abuse convictions were merged into the aggravated child abuse convictions, and on the latter he received concurrent sentences of twenty and twenty-two years. On appeal, the defendant argues that the trial court erred by (1) overruling his motion to suppress his statement to police, (2) overruling his motion to disqualify the District Attorney General from prosecuting the case, (3) failing to order the prosecution to answer the defendant's request for a Bill of Particulars, (4) failing to grant his motion for new trial based on the state's refusal to provide *Jencks* and *Brady* material, and (5) submitting the same offenses to the jury for consideration as aggravated child abuse and aggravated child neglect without a jury instruction on election of offenses. Following our review of the parties' briefs, the record, and the applicable law, we reverse the judgments of the trial court and remand this case for a new trial.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Reversed and Remanded

J.C. McLIN, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR. and ROBERT W. WEDEMEYER, JJ., joined.

Larry Samuel Patterson, Jr., Columbia, Tennessee, and for the appellant, Randy Lee Ownby.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; W. Michael McCown, District Attorney General; and Weakley E. Barnard, Brooke Grubb and Ann L. Filer, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. BACKGROUND

A. Trial

Tammy Darnell testified that she was the mother of the victim, S.L., and gave birth to her on January 18, 2006.[1] Tammy stated that the defendant is S.L.'s father.[2] Tammy stated that on May 2, 2006, S.L. would have been three-and-half-months old, give or take a day. According to Tammy, after giving birth, she, S.L., and the defendant lived with her parents, Ellis and Patsy Darnell, in Belfast, Tennessee. Her son, seven-and-half-year-old Jonathan Rucks Middleton, also lived with the family at that residence. Tammy stated that there was nothing medically wrong with S.L. at birth. She said that the defendant was laid off from his job on February 14, 2006, shortly after S.L. was born. Tammy testified that the defendant helped care for S.L. after she was born.

Tammy testified that in March of 2006, she noticed bruising on S.L.'s wrist and ankle. She suspected that the bruising was caused by S.L.'s movement in the crib. Tammy asked the defendant if he knew how the bruises got there, and he told her that he did not know. In April of 2006, Tammy noticed bruising in multiple locations on S.L.'s body. She also noticed that S.L. suffered from breathing and wheezing problems. Tammy took S.L. to see her pediatrician, Dr. Mildred Chen, on May 2, 2006. Tammy stated that she was concerned about the bruising and feared that S.L. might be suffering from a blood disorder. After examining S.L., Dr. Chen told Tammy to take her to Hillside Hospital for blood work and x-rays. After tests were performed, Tammy, Patsy, and S.L. were sent home. Shortly after they arrived at home a Department of Children's Services (DCS) caseworker, Derek Hunter, arrived at the Darnell house and asked to speak to Tammy.

Tammy testified that Derek Hunter asked her if she was aware that S.L. had any broken bones. Tammy stated that she was shocked to learn that S.L. had multiple fractures. Mr. Hunter called the Marshall County Sheriff's Department. Detective Bob Johnson arrived and S.L. was taken to Vanderbilt Hospital. S.L. remained at Vanderbilt Hospital for two days in DCS custody. Tammy learned that S.L. had a broken femur and multiple rib fractures. Tammy was allowed to stay with S.L. at the hospital. The defendant visited S.L. at the hospital once or twice for three or four hours at a time.

Tammy testified that the defendant told her after she returned from Vanderbilt Hospital that he might have caused the injuries to S.L. Tammy stated that the defendant told her that if he had caused the injuries, he was sorry. Tammy acknowledged that since S.L. had been in foster care, she had not suffered any more bruising. Tammy acknowledged that S.L. was still in the custody of foster parents. She stated that she was able to visit S.L. at least two times a week. She admitted that her mother, Patsy, slipped and fell on a wet floor at the house while holding S.L. when she was approximately six weeks old. Patsy's elbow was cut open and required attention but S.L. did not suffer any apparent injuries.

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[1] Because the victim in this case is a minor, we have determined to refer to her by her initials only.

[2] In order to avoid confusion, we will refer to Tammy Darnell, S.L.'s mother, and Patsy Darnell, S.L.'s grandmother, by their first names. No disrespect is intended to either party.

On cross-examination, Tammy testified that she had been the defendant's girlfriend for about four years prior to S.L.'s removal. She stated that the defendant had lived with her family since age eighteen. She stated that S.L. was a healthy baby. Tammy described the defendant as a good father and testified that she had never seen him hurt S.L. However, she recalled one incident where the defendant told Tammy that he had checked on S.L. and noticed that S.L. was bleeding from her nose and mouth. Tammy stated that she did not see the bleeding herself. After that incident, Tammy bought a larger bumper pad to go around the inside of the crib.

Tammy testified that she was currently taking Buspirone, Sitapam and Clonopin for depression, nerve problems, and anxiety attacks. She stated that she never got frustrated with S.L. She could not recall telling her mother and the defendant that she could not handle "this" any more, or telling Patsy and the defendant to take care of the child. Tammy testified that she took S.L. to see her pediatrician, Dr. Mildred Chen, three to four times between January and May of 2006. All visits, except for the visit on May 2, 2006, were for routine check-ups and immunizations. She reiterated that after the May 2 visit, S.L. was sent to Hillside Hospital for x-rays and blood work. During S.L.'s hospitalization, Derek Hunter and an individual from Vanderbilt Children's Hospital spoke with the defendant about S.L.'s injuries. Tammy and the defendant both spoke with Detective Johnson again on May 8, after S.L.'s release from the hospital. Tammy spoke with Detective Johnson first, and then Detective Johnson questioned the defendant. The defendant was arrested after his interview. Tammy did not recall returning home after the defendant's arrest and telling her aunts that she caused the injuries to S.L. or stating that she did not know why they had arrested the defendant.

On re-direct examination, Tammy testified that she did not take any anti-depressants or other medications until after she lost custody of S.L. She stated that the events leading to the defendant's arrest were what caused her to take the medications. Tammy also re-emphasized that she did not speak to her aunts, Helen Rogers, Debby Jett, or Pauline Callahan about the investigation into S.L.'s injuries. However, Tammy said that after May 4, she began passing out and suffering from blackouts which affected her memory. She also confirmed that shortly after her mother fell while holding S.L., S.L. was taken for a routine check-up. According to Tammy, Dr. Chen did not notice any broken bones during that visit. Tammy also recalled that after the defendant told her that S.L. had a bloody mouth and nose, she noticed dried blood around S.L.'s mouth. Tammy stressed that this incident occurred some time before she noticed the bruising on S.L.'s body that led her to schedule the appointment with Dr. Chen on May 2. Tammy clarified that the bloody mouth and nose incident occurred at the end of February or beginning of March.

Patsy Darnell testified that she was S.L.'s grandmother, and Tammy Darnell's mother. She stated that prior to the defendant's arrest, she lived together with the defendant, Tammy, her husband Ellis, S.L., and Tammy's son Jonathan. Patsy acknowledged that the defendant had lived with her in her home since age eighteen. She confirmed that S.L. slept in a crib in Tammy's room separate from the defendant's bedroom. Patsy also confirmed that she went with Tammy to every one of S.L.'s doctor appointments. When S.L. was about six weeks old, Patsy noticed two bruises on S.L. and determined that they needed a new bumper for the crib. She told Tammy that if she saw any

more bruises, she was going to take S.L. back to the pediatrician. When S.L. later suffered multiple bruises, Patsy returned with Tammy to the pediatrician's office. Patsy also went with Tammy to Hillside Hospital when Dr. Chen sent S.L. to get blood work and x-rays performed.

Patsy Darnell testified that she slipped and fell on some water on the hallway floor while holding S.L. when S.L. was approximately six weeks old. She stated that she held S.L. up as she fell and made sure that S.L. did not hit the floor. Patsy cut her elbow and bled after the fall. Patsy stated that Tammy was distraught and cried a lot after she returned home following S.L.'s release from Vanderbilt Hospital.

On cross-examination, Patsy testified that she never saw the defendant hit or otherwise harm S.L. She also acknowledged that the defendant frequently fed S.L., changed her diapers, and rocked her to sleep at night. Patsy stated that she never noticed injuries to S.L's ribs. She could not recall whether she told Dr. Chen or anyone at Hillside Hospital or Vanderbilt Hospital about the time she fell while holding S.L. Patsy stated that after she and Tammy returned from Vanderbilt Hospital, the defendant told them that he did not want them to be mad at him and said that "if he done it, [he] didn't mean to." She admitted that she did not tell the police about the defendant's statement because she did not want to get the defendant into trouble.

Dr. Mildred Chen testified that she was a board-certified pediatrician with Pulaski Pediatrics in Pulaski, Tennessee. She stated that she had seen approximately five to ten child abuse cases during her time in practice. She was present for S.L.'s birth and continued to see her for regular check-ups. According to Dr. Chen, S.L. was full-term at birth and had no other medical problems. Dr. Chen saw S.L. for her first check-up on February 7, 2006. She saw her again on February 22 for cough and congestion. Dr. Chen diagnosed a common cold and noted no other symptoms. She saw S.L. again on March 23 for her two-month check-up and did not note anything abnormal at that time.

Dr. Chen testified that the next time she saw S.L. was May 2, 2006. Tammy Darnell brought S.L. to see Dr. Chen because she was concerned about bruising to S.L.'s face, legs, and arms. S.L. was three-and-a-half months old at the time of the May 2 examination. Dr. Chen noted bruising over both cheeks, on the left forearm above the wrist, and on the right leg. Dr. Chen stated that she was concerned because a child of S.L.'s age was not ambulatory, could not roll over, and therefore should not have suffered these types of injuries. Dr. Chen stated that she believed S.L.'s injuries were "non-accidental." Dr. Chen told Tammy and Patsy Darnell that she was going to send S.L. to nearby Hillside Hospital for a blood test and x-rays to see if S.L. had a blood disorder or fractures.

Dr. Chen testified that she also noticed that S.L. was breathing irregularly or "splinting" intermittently. Dr. Chen described splinting as forced expiration often caused by pain in the chest arising from the lining of the lungs, the chest wall, or rib cage. Dr. Chen reviewed the x-ray results which showed old and new rib fractures of the 4th, 5th, 6th, and 7th ribs on the left side. The rib fractures she noted were to the posterior ribs located near S.L.'s back. S.L. also had two fractures to the right thigh bone or femur. Dr. Chen stated that immediately after reviewing the x-ray results, she called the Department of Children's Services as required by state law. She stated that the results

of the blood test appeared normal. Dr. Chen ruled out blood disorders as a possible cause of S.L.'s bruises. Dr. Chen also testified that she made a note during the May 2 visit that Tammy Darnell told Dr. Chen that she didn't want people to think that she was abusing her baby.

Dr. Chen testified that given S.L.'s overall length, she was small and weighed less than 90 to 95 percent of similarly situated full-term babies. Dr. Chen stated that she was familiar with a disorder known as osteogenesis imperfecta. She stated that osteogenesis imperfecta was caused by a deficiency in the amount of procollagen in a child's bones which caused the child to suffer from bones that fractured easily. She described procollagen as the glue that helps make the bones strong and healthy. Dr. Chen stated that osteogenesis imperfecta can be diagnosed by completing collagen studies, a skin punch biopsy, or in limited cases, by examining a series of x-rays. Dr. Chen acknowledged that she did not perform any of these tests on S.L. Dr. Chen was able to differentiate between new and old fractures based on the presence of callous formations. She testified that callous formations are deposits that develop as a fracture site heals. According to Dr. Chen, newer fractures typically do not have callous formations. She opined that the newer fractures were inflicted within the week prior to S.L.'s visit on the 2nd of May.

Dr. Chen testified that the fracture of S.L.'s femur was considered a "buckle fracture." She described a buckle fracture as an incomplete fracture, similar to a green tree limb that is bent until it splits but does not break completely. She stated that in a buckle fracture, you can see the bend in the bone. She acknowledged that it may be possible for a buckle fracture to occur if S.L. was pulled up by her leg, or if she had been injured when the person holding her fell. Dr. Chen stated that neither Tammy nor Patsy Darnell mentioned to her that Patsy Darnell had fallen while holding S.L. Dr. Chen testified that she saw S.L. again on May 17, 2006. On that visit, S.L. appeared healthy and normal and did not appear to be splinting or grunting on exhalation.

Christopher Greeley testified that he was a board-certified pediatrician and practiced at Vanderbilt University Children's Hospital. Dr. Greeley further testified that he had researched and published articles on child abuse and had previously testified at least a dozen times in cases concerning child abuse. Dr. Greeley stated that he supervised a nationally-recognized Child Care Team that reported between 250 to 400 child abuse cases per year, with 70 to 80 of those cases pertaining to physical abuse alone.

Dr. Greeley testified that at approximately three months of age, S.L. was admitted and treated for two days at Vanderbilt Hospital. S.L. received a series of CAT scans and x-rays, as well as a nuclear bone scan. Following her initial two-day visit, S.L. was seen one month later for a series of follow-up x-rays. Dr. Greeley noted three old rib fractures and three new rib fractures, all on the posterior left side. In addition, he noted three lower leg fractures; a fracture at the hip and a fracture around the knee (both on the femur bone), and a fracture at the very end of the ankle. Further investigation revealed one additional new rib fracture, bringing the total of new left-side rib fractures to four. Dr. Greeley testified that the location of S.L.'s rib fractures corresponded to where an adult's fingers would be when picking up or holding a child. Dr. Greeley also opined that the time span between the old and new rib fractures was approximately three to four weeks.

Dr. Greeley testified that he did not believe that a child of S.L.'s age was capable of rolling over. He was aware that Patsy Darnell had slipped and fallen while holding S.L. He did not believe the incident was responsible for S.L.'s injuries. Dr. Greeley concurred with Dr. Chen's assessment that S.L.'s injuries were non-accidental. He further stated that the injuries to S.L.'s ribs required the force of adult pressure. According to Dr. Greeley, S.L. did not have osteogenesis imperfecta or "brittle bone disease." He asserted that patients with osteogenesis imperfecta don't suffer broken ribs or suffer buckle fractures. He also stated that the disease is inherited from family members. According to Dr. Greeley, S.L. had no family history for osteogenesis imperfecta. Furthermore, S.L.'s bone structure, as seen on x-rays and bone scans, did not appear abnormal in manner characteristic of a patient with osteogenesis imperfecta. Dr. Greeley also stated that he was able to rule out any blood disorders as a possible cause of the bruises S.L. suffered.

Bob Johnson testified that he was a Detective with the Marshall County Sheriff's Department on May 2, 2006, when he received a telephone call from Derek Hunter regarding S.L. Detective Johnson arrived at the Darnell residence just as Mr. Hunter was preparing to transport S.L. to Vanderbilt Hospital. Detective Johnson spoke separately to each individual at the home. He learned from Tammy and Patsy Darnell that neither knew what had happened. The defendant told Detective Johnson he may have injured S.L. while trying to put her to sleep. Specifically, the defendant told him he may have squeezed S.L. too hard.

On May 5, 2006, Detective Johnson summoned the defendant, Tammy, and Patsy Darnell to the Sheriff's Department for interviews. During separate interviews, all three individuals told Detective Johnson that they did not know what had happened to S.L. Subsequently, on May 8, 2006, he and Tennessee Bureau of Investigation (TBI) Agent Michael Smith interviewed the defendant again. Agent Smith advised the defendant of his *Miranda* rights. The defendant signed a waiver of his rights and agreed to speak with Detective Johnson and Agent Smith. He told them that he had squeezed the baby too hard on two separate occasions. The defendant stated that both times, he had been rocking S.L. for thirty to forty-five minutes and had squeezed S.L. to relieve gas pain. Detective Johnson read the following excerpt of the defendant's statement into the record:

> I got a baby bottle. I changed her diaper and then I fed her. Then I tried to put her to sleep. I rocked her about thirty minutes. She would not stop crying. I got frustrated because she would not stop crying. I squeezed the baby because I was frustrated with her. After I squeezed her, she finally went to sleep.
>
> The next time I squeezed her I heard the baby crying, I went into the room where Tammy and the baby sleep. I changed her diaper and fed the baby. Again, I rocked her for 45 minutes to an hour. The baby would not stop crying. I then became frustrated and squeezed the baby. Both times I squeezed the baby too hard that is why her bones were fractured. Both times the baby's head was on my right arm; the baby's face and stomach was facing my chest, the baby's legs were under my left arm when I squeezed her. After both times I felt I had squeezed her too hard.

> I did talk to Tammy after I talked to the Detectives on Monday about squeezing [S.L.]. I told Tammy I had squeezed her too hard and more than likely caused the injuries.

The statement was signed by the defendant and he initialed a portion of his statement where a misspelling had been noted.

On cross-examination, Detective Johnson acknowledged that he was not present for all of Agent Smith's interview with the defendant. According to Detective Johnson, the defendant said that the second squeezing incident occurred three to four weeks after the first incident. The defendant read and signed his statement. After the defendant signed his statement, Assistant District Attorney (ADA) Barnard came into the interview room. ADA Barnard read the defendant's statement and asked the defendant if that was indeed his statement. ADA Barnard then left the interview room. Detective Johnson agreed that S.L.'s first injuries appeared to have been inflicted between mid-February and the first of March. He further agreed that the date of the infliction of the second set of injuries occurred sometime in April.

Michael Smith testified that he was a Special Agent with the Tennessee Bureau of Investigation (TBI) and conducted an initial interview of the defendant. Initially, the defendant told Agent Smith that he did not injure the child and had no idea who could have inflicted the injuries she suffered. The defendant stated that he believed the injuries to S.L. were caused accidentally. Agent Smith determined that the defendant was being untruthful. He, along with Detective Johnson, interrogated the defendant after the defendant signed a written waiver of his rights. The defendant recanted his earlier statements and admitted that he caused S.L.'s injuries. The defendant detailed two occasions where he caused the injuries to the child. The defendant stated he was "95% to 98%" certain he caused the injuries to S.L. However, he reiterated that it was an accident and that he had not meant to hurt her. The defendant told Agent Smith that he wanted to get help for his frustration. The defendant's oral statement was written down by Detective Johnson.

Mary Helen Rogers, Debby Jett, and Pauline Callahan each testified that they were Tammy Darnell's aunts and Patsy Darnell's sisters. All three women stated that on May 8, 2006, they went to the Darnell home to offer their assistance after hearing what had happened. The women cleaned the Darnell house so that S.L. could return home. While all three women were in the kitchen, Tammy and Patsy Darnell returned from the Sheriff's Department. According to Ms. Rogers, she asked what was going on, and Patsy Darnell replied that Tammy was under a lot of stress. Tammy Darnell was upset and said that she had "hurt [her] baby." When Ms. Rogers asked her what she had done, Tammy responded that she did not know. She said that she did not know how she did it or why. When Ms. Callahan asked what was meant by that, Tammy said, "I did it." Ms. Callahan asked Tammy, "What do you mean I did it? How did you do it?" Tammy said she did not remember what she was doing and said she was stressed out because the defendant was never at home and was always off with her brother. Ms. Jett testified that her sister, Pauline, asked Tammy why she didn't know if she hurt the baby, and Tammy responded that she had been under a lot of stress. Ms. Jett

stated that Tammy teared up as she made these statements. Tammy repeated that she had hurt her baby.

The defendant testified that he was thirty-two years old and had lived with the Darnells since his graduation from high school at age eighteen. The defendant acknowledged that he had not lived with the Darnells or talked to them since his arrest. The defendant stated that he had worked as a roofer for ten to fifteen years and had most recently worked at the Ken-Koat Corporation until he was laid off. He stated that he was able to draw unemployment to support Tammy and S.L. According to the defendant, he was involved in the care of S.L. between January 18 and May 8, 2006. The defendant would get up at night, change S.L.'s diapers, feed her, and rock her to sleep. He described Tammy as a good mother, although he acknowledged that she would get upset at times. The defendant testified that there was one incident where Tammy told him that S.L. had hit her mouth on the rails of the baby bed, causing it to bleed. He stated that the injury occurred around February or March. The defendant stated that there was another episode where Tammy went to pick S.L. up from her swing. Without warning, Tammy turned to Patsy and the defendant and told them, "I can't handle it," instructed them to take care of S.L., and walked off into the bedroom.

The defendant testified that he noticed bruising on S.L.'s wrist and ankle around the end of April, beginning of May. Tammy noticed the injuries first and pointed them out to the defendant. The defendant stated that S.L. did not have any medical issues apart from her "breathing problems." According to the defendant, S.L. had a cold for almost the entire three month period before her hospitalization. The defendant said that he, Tammy, Patsy, and Ellis Darnell all smoked.

The defendant testified that Tammy took anti-depressant medication prior to her pregnancy with S.L. He stated that she began the medication about the time they began going out. He stated that he, Tammy, and Patsy all agreed to take S.L. back to the doctor for an evaluation in May after seeing the bruises to her wrist and ankle. The defendant denied doing anything to hurt S.L. According to the defendant, he and Tammy were shocked to learn that S.L. had broken bones. The defendant told Detective Johnson that he did not know what happened to S.L. unless he had accidentally applied too much pressure while rocking her to sleep.

The defendant testified that he drove Patsy to the hospital after S.L. was taken to Vanderbilt. The defendant visited S.L. for three to five hours each day she was at Vanderbilt. The defendant told Dr. Greeley the same thing he told Detective Johnson; that he did not know how S.L. got her injuries unless it happened while he was rocking her and applying a little pressure. According to the defendant, he had been rocking the baby and trying to get her to sleep on at least two occasions. Both times, S.L. was crying and passing gas, and he believed she had a stomach ache. He applied a little pressure to ease the stomach ache. The defendant testified that he did the same thing both times. He claimed that he was not mad or frustrated on either occasion.

The defendant testified that he spoke with Detective Johnson on May 2, 2006, and spoke with him again at the Sheriff's Department on May 5, 2006. Detective Johnson asked him the same questions both times. The defendant returned to the Sheriff's Department at Detective Johnson's

request on May 8, 2006. On this visit, the defendant spoke with Officer Johnson and Agent Smith. He denied squeezing S.L. too hard and denied making a statement that he squeezed S.L. because he was frustrated with her. The defendant acknowledged that his written statement stated that he "squeezed [S.L.] too hard." He denied that he got to read his statement before signing it and denied that Detective Johnson also read it back to him. The defendant stated that after signing the statement, ADA Barnard came into the interview room and questioned him about what had happened. The defendant admitted that after his arrest, he was told that it would be better if he stayed away from the Darnell household.

On cross-examination, the defendant testified that he only noticed the bruises that appeared on S.L.'s wrist and ankles and did not notice the bruises on S.L.'s cheeks and abdomen noted by Dr. Chen. The defendant reiterated that he did not squeeze S.L., he merely "applied a little pressure" to get her stomach ache to go away. The defendant asserted that both Detective Johnson and Agent Smith were incorrect when they testified that the defendant squeezed S.L. The defendant acknowledged that he told Agent Smith that if he had hurt S.L. by applying too much pressure, he wanted Agent Smith to tell the Attorney General that he had not meant to hurt her.

Detective Johnson was recalled and testified that the defendant's written statement came verbatim from the defendant's oral statement to Detective Johnson and Agent Smith. Detective Johnson confirmed that he read the defendant's statement back to him as soon as he finished writing it down and that the defendant initialed a spelling error and signed it. Detective Johnson testified that ADA Barnard came into the interview approximately ten minutes after the defendant signed the statement. ADA Barnard read the statement back to the defendant and asked him if the statement was his and if it was correct. The defendant acknowledged that it was his statement, and ADA Barnard left the interview room.

Captain Norman Dalton testified that he was also present during the May 8, 2006, interview with the defendant. He stated that the defendant demonstrated how he held and squeezed S.L. Captain Dalton testified that the defendant described his actions with regard to S.L. as a "squeeze." Captain Dalton also stated that the defendant did not say that when he squeezed S.L. he did so accidentally.

The defendant was convicted by a jury of two counts of aggravated child abuse and two counts of child abuse. At the sentencing hearing, the trial court concluded that at least four separate enhancement factors applied to the defendant. The court sentenced the defendant to an effective sentence of twenty-two years for his convictions on two counts of aggravated child abuse, Class A felonies. The child abuse convictions were merged into the aggravated child abuse convictions.

II. ANALYSIS

A. Disqualification of the Assistant District Attorney General

The defendant argues as one of his issues on appeal, that the Assistant District Attorney General and the Marshall County District Attorney General's office should have been disqualified from prosecuting the case against the defendant based upon ADA Barnard's questioning of the defendant during the criminal investigation.

It is well-established that a trial court's ruling on the disqualification of an attorney and of the entire office is reviewed under an abuse of discretion standard. *Clinard v. Blackwood*, 46 S.W.3d 177, 182 (Tenn. 2001); *State v. Culbreath*, 30 S.W.3d 309, 313 (Tenn. 2000). This court has espoused the following test for determining whether disqualification of a prosecutor is required:

> (1) Do the circumstances of the defendant's case establish an actual conflict of interest that requires the disqualification of a prosecutor? (2) Do the circumstances of the defendant's case create an appearance of impropriety that requires the disqualification of a prosecutor? (3) If either theory requires the disqualification of a prosecutor, is the entire District Attorney General's office likewise disqualified?

State v. Coulter, 67 S.W.3d 3, 29 (Tenn. Crim. App. 2001) (citing *Culbreath*, 30 S.W.3d at 312-313); *see also State v. Tate*, 925 S.W.2d 548, 550 (Tenn. 1995). A prosecutor's disqualification need not be imputed to the "entire district attorney general's office . . . so long as the attorney at issue does not disclose confidences or otherwise participate in the prosecution." *Tate*, 925 S.W.2d at 556. Furthermore, "[t]he focus on whether a district attorney or any assistants within the office should be disqualified often depends upon the value of their potential testimony." *State v. Baker*, 931 S.W.2d 232, 237 (Tenn. Crim. App. 1996). This court and our supreme court have previously concluded that an Assistant District Attorney General's participation in the investigation leading to the indictment and prosecution of a defendant does not disqualify him from prosecution of the underlying case. *State v. Claybrook*, 736 S.W.2d 95, 104 (Tenn. 1987); *see also State v. Elrod*, 721 S.W.2d 820 (Tenn. Crim. App. 1986). "The actions of [the Assistant District Attorney General] in the investigation of this case, including the interrogation of the defendant following his arrest, were a part of his sworn and required duties as an Assistant District Attorney General. There is no merit to this issue." *Elrod*, 721 S.W.2d at 822. This court has also determined that an attorney, employed by the state and involved in the prosecution of the case who may be called as a witness by the opposing party is not subject to disqualification unless or until it becomes evident that his testimony will be prejudicial to the interests of his client. *See State v. Browning*, 666 S.W.2d 80, 87 (Tenn. Crim. App. 1983); *see also State v. Zagorski*, 701 S.W.2d 808, 815 (Tenn. Crim. App. 1985).

Upon review of the record we note that the defendant argues that the involvement of ADA Barnard in the defendant's interview provides adequate cause to disqualify him and the Marshall County District Attorney General's office from prosecuting the case against the defendant. In the defendant's pre-trial motions and at the hearing on the defendant's motion for suppression prior to trial, the defendant alleged that ADA Barnard came into the interview room before the defendant had an opportunity to read his statement. According to the defendant, ADA Barnard asked him numerous questions. The defendant wanted to call ADA Barnard as a witness to testify to the

circumstances surrounding the defendant's statement and the extent of the questions asked by ADA Barnard.

We note that the testimony of Detective Johnson and Agent Smith reflects that the defendant had already read his statement and signed it before ADA Barnard entered the room. Additionally, Detective Johnson read the statement aloud to the defendant before he signed it, and had him initial spelling corrections before obtaining the defendant's signature. Detective Johnson testified that ADA Barnard entered the interview room, read the defendant's statement, had the defendant to confirm that it was in fact his statement, and then departed. The trial court did not credit the defendant's testimony at the suppression hearing. Furthermore, because it is unlikely that ADA Barnard's testimony at trial would have prejudiced the interests of the state, and because we recognize the well-established rule that an Assistant District Attorney General's participation in the investigation of the defendant does not in and of itself require disqualification. *See generally Claybrook*, 736 S.W.2d at 104; *see also Elrod*, 721 S.W.2d at 822. Therefore, the defendant is not entitled to relief as to this issue.

B. Suppression of the Defendant's Statement

As his next issue on appeal, the defendant argues that his statement to law enforcement officials should be suppressed because it was made involuntarily, contained false statements, and the defendant did not have an opportunity to read his statement before signing it.

When reviewing the trial court's ruling on a motion to suppress, the court's findings of fact are presumed correct unless the evidence contained in the record preponderates against them. *See State v. Daniel*, 12 S.W.3d 420, 423 (Tenn. 2000). "Questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." *State v. Lawrence*, 154 S.W.3d 71, 75 (Tenn. 2005) (quoting *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996)). The prevailing party is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences that may be drawn from that evidence. *State v. Hicks*, 55 S.W.3d 515, 521 (Tenn. 2001). However, appellate review of a trial court's conclusions of law and application of law to facts on a motion to suppress evidence is a de novo review. *See State v. Nicholson*, 188 S.W.3d 649, 656 (Tenn. 2006); *State v. Walton*, 41 S.W.3d 75, 81 (Tenn. 2001).

Both the United States and Tennessee Constitutions protect the accused from compelled self-incrimination. *See* U.S. Const. amend. V; Tenn. Const. art. I, § 9. As a result, police officers are prohibited from using statements made by the accused during custodial interrogation unless the accused has been previously advised of his or her constitutional right to remain silent, right to an attorney, and the accused knowingly, voluntarily and intelligently waives those rights. *See Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Whether waiver of a right is voluntarily, knowingly, and intelligently made is determined by the totality of the circumstances under which the right was waived. *See State v. Middlebrooks*, 840 S.W.2d 317, 326 (Tenn. 1992). "A defendant's subjective perception alone is not sufficient to justify a conclusion of involuntariness in the constitutional

sense." *State v. Smith*, 933 S.W.2d 450, 455 (Tenn. 1996) (citations and internal quotations omitted). "The primary consideration in determining the admissibility of the evidence is whether the confession is an act of free will." *State v. Berry*, 141 S.W.3d 549, 577-78 (Tenn. 2004). A confession is not voluntary when "the behavior of the state's law enforcement officials was such as to overbear" the will of an accused and "bring about confessions not freely self-determined." *Id*. (citing *State v. Kelly*, 603 S.W.2d 726, 728 (Tenn. 1980)). In determining whether a defendant validly waived his rights, the court must consider the following factors: (1) the defendant's age, education or intelligence level, or previous experience with the judicial system; (2) the repeated and prolonged nature of the interrogation, including the length of detention prior to the confession; (3) the lack of any advice regarding his constitutional rights; (4) the unnecessary delay in bringing the defendant before a magistrate prior to the confession; (5) the defendant's intoxication and ill health at the time the confession was made; (6) the deprivation of food, sleep or medical attention; (7) any physical abuse or threats made to the defendant. *See State v. Huddleston*, 924 S.W.2d 666, 671 (Tenn. 1996); *State v. Readus*, 764 S.W.2d 770, 774 (Tenn. Crim. App. 1988).

In the instant case, the defendant was invited to speak with Detective Johnson and Agent Smith on May 8, 2006. The record reflects that the defendant was read his *Miranda* rights and voluntarily signed a waiver of those rights before being questioned. At the hearing on the defendant's motion to suppress his statement, the trial court noted that the defendant completed his high school education, was not intoxicated or incapacitated, was not coerced, and appeared to understand the questions being asked of him. The trial court credited Detective Johnson's testimony that he wrote the defendant's words down verbatim, read the statement back to the defendant, and had the defendant read and sign it before ADA Barnard arrived.

At trial, the defendant asserted that his "will was overborn" and he was coerced into signing the statement after three hours of repetitive questioning. The defendant argued that he did not have an opportunity to read the statement before signing it, and that immediately upon signing it, ADA Barnard questioned him about the veracity of his statement. However, the testimony of Detective Johnson, Agent Smith, Captain Dalton, and ADA Barnard reflects that the defendant gave a statement in which he admitted that he "squeezed S.L. too hard." Detective Johnson and Agent Smith testified that Detective Johnson read the defendant's statement back to him, had the defendant initial a spelling error correction, and allowed the defendant to read the statement himself before signing it. We conclude that the evidence does not preponderate against the trial court's denial of the defendant's motion to suppress. Therefore, the defendant is not entitled to relief as to this issue.

C. Election of Offenses: Bill of Particulars and Jury Instructions

In separate issues in his appeal, the defendant argues that the trial court erred by failing to order the state to provide a Bill of Particulars and by failing to issue a jury instruction which explained to the jury the need to elect between the offenses of aggravated child abuse and aggravated child neglect. Because both of these alleged errors fall under the category of election of offenses, we consolidate these issues for review.

Our supreme court has held that where a defendant commits multiple offenses against a victim, the state has a duty to elect which act or occurrence relates to which particular charged offense for which the state seeks a conviction. *State v. Adams*, 24 S.W.3d 289, 294 (Tenn. 2000). The court, in *Adams*, elaborated upon the purposes of election in the following manner:

> First, [election] ensures that a defendant is able to prepare for and make a defense for a specific charge. Second, election protects a defendant against double jeopardy by prohibiting retrial on the same specific charge. Third, it enables the trial court and the appellate courts to review the legal sufficiency of the evidence. The most important reason for the election requirement, however, is that it ensures that the jurors deliberate over and render a verdict on the same offense. [*State v.*] *Brown*, 992 S.W.2d [389, 391 (Tenn. 1999)]; [*State v.*] *Burlison*, 501 S.W.2d [801, 803 (Tenn. 1973)]. This right to a unanimous verdict has been characterized by this Court as "fundamental, immediately touching on the constitutional rights of an accused . . . ." *Burlison*, 501 S.W.2d at 804.

Id. Additionally, our supreme court has noted:

> [E]lection at the end of the state's proof does little to aid the defendant in preparing his defense. A defendant is obviously better served by requesting a bill of particulars before trial . . . The third *Burlison* rationale addresses the most serious concern: the well-established right under our state constitution to a unanimous jury verdict before a criminal conviction is imposed. For this reason, when evidence suggests that a defendant has committed many . . . crimes against a victim, the court must require the state to elect the particular offenses for which convictions are sought.

State v. Shelton, 851 S.W.2d 134, 137 (Tenn. 1993) (internal citations omitted).

With regard to whether the state should be required to provide a Bill of Particulars to a defendant, Tennessee Rule of Criminal Procedure 7(c) provides that "[u]pon motion of the defendant[,] the court may direct the filing of a Bill of Particulars so as to adequately identify the offense charged." The trial court's denial of a Bill of Particulars will not be reversed absent a showing of abuse of discretion. *See State v. Stephenson*, 878 S.W.2d 530, 539 (Tenn. 1994), *abrogated on other grounds* by *State v. Saylor*, 117 S.W.3d 239, 246 (Tenn. 2003). Recently, this court elaborated upon the purposes of a Bill of Particulars as follows:

> There are three purposes for a bill of particulars: (1) to provide the defendant with information about the details of the charge if necessary for the preparation of the defense; (2) to avoid prejudicial surprise at trial; and (3) to enable the defendant to preserve a claim of double jeopardy. *State v. Byrd*, 820 S.W.2d 739, 741 (Tenn. 1991). The Advisory Commission Comments to Rule 7(c), Tennessee Rule of Criminal Procedure, state that the purpose of the bill of particulars is to enable the defendant to know "precisely what he or she is charged with." It is not meant to be

> used for the purposes of broad discovery. *See* Tenn. R. Crim. P. 7(c), Advisory Commission Comments; *see also Stephenson*, 878 S.W.2d at 539; *State v. Green*, 995 S.W.2d 591, 602 (Tenn. Crim. App. 1998).

State v. Tony Best, No. E2007-00296-CCA-R3-CD, 2008 WL 4367529 at *21 (Tenn. Crim. App. at Knoxville, Sept. 25, 2008).

In *State v. Hicks*, our supreme court previously held that a Bill of Particulars is not required if the defendant is able to obtain the needed information from another source. According to the court:

> A defendant should be given enough information about the events charged so that he may, by the use of diligence, prepare adequately for the trial. If the needed information is in the indictment or information, then no bill of particulars is required. The same result is reached if the government has provided the information called for in some other satisfactory form.

State v. Hicks, 666 S.W.2d 54, 56 (Tenn. 1984) (quoting 1 C. Wright, Federal Practice and Procedure, Criminal, § 129 (1982)). The defendant's request for a Bill of Particulars focused on "whether or not the defendant's timely motion for a Bill of Particulars respecting the time and place of the offenses charged should have been granted under Rule 7(c), Tennessee Rules of Criminal Procedure." *Id*. at 57. Similarly, the defendant in the instant case sought clarification from the state in order to ascertain which of the twelve charged offenses corresponded to which acts the defendant was alleged to have committed. In *Hicks*, the failure of the trial court to grant the defendant's motion for a Bill of Particulars constituted reversible error. *Id*.

This court has previously held that if an indictment "sufficiently apprise[s] the [d]efendant" of the charges, they are sufficient to allow pronouncement of a judgment. *State v. Misty Brunelle*, No. E2006-00467-CCA-R3-CD, 2007 WL 2026616 at *13 (Tenn. Crim. App., at Knoxville, July 13, 2007), *perm. app. denied* (Tenn. Oct. 22, 2007). In *Brunelle* the defendant moved for a Bill of Particulars requesting that the state specify the times, places, injuries, and behaviors associated with the acts for each count of the indictment. In *Brunelle*, as in the present case, the defendant was charged with multiple counts of aggravated child abuse. The state provided a Bill of Particulars to the defendant. We note that the indictments in *Brunelle* are distinct from the indictments in the instant case. First, the indictments in *Brunelle* connected the charged offense to the actual physical injury caused by that offense, even prior to the state's issuance of a Bill of Particulars. Second, because the counts of the indictment were set out in sequential order and each charged offense occurred after the offense alleged in the previous count, the defendant received sufficient information to determine which alleged act was connected to which charged alleged offense, and the state was able to avoid the risk of double-jeopardy.

Upon review of the record in the instant case, we note that the defendant was charged in a twelve-count indictment which included the offenses of aggravated child abuse and neglect, reckless

endangerment and aggravated assault. In the hearing on his pre-trial motion for a Bill of Particulars, the defendant argued that it appeared from the medical records that there were two separate incidents of abuse between January 18 and May 2, 2006. The state informed the court that it was waiting to receive additional medical records to determine which incidents occurred at which time. In addition, the following exchange was held during the hearing on the defendant's motion for a Bill of Particulars:

> Prosecutor: I won't belabor the point if we have answered the question by saying Counts 1 through 6 involve an occurrence and Counts 7 through 12 involve a different occurrence, which takes care of the two occurrences that the Defendant said occurred.
>
> The Court: I think he is posing that as a question to you [defense counsel].
>
> Defendant: Obviously I want to know as much as I can so I can adequately defend my client . . . . If the State is saying Counts 1 through 6 deals with the ribs and 7 through 12 deals with the legs. These happened on two separate dates.
>
> These are alternative theories of what allegedly happened . . . . I do need to know exactly on what count – what he is alleging that he committed, aggravated child abuse in several of the counts; and child abuse and aggravated assault and reckless endangerment . . . I believe I need to adequately know what we are talking about in each count so I can adequately defend at trial to a jury when they are claiming he did such and such, are we talking about Count 12 or are we talking about 1 or, you know, what injuries exactly.
>
> The Court: [W]e may be – well, some of these counts are lesser included offenses. But that would be handled in the instructions, I think.
>
> . . . .
>
> Defendant: It's apparent from the doctor's records that they are talking about, rib fractures, various ages. There is a right femur, distal buckle and right distal tibia buckle, possible left shoulder injury.
>
> And I just believe that to adequately defend my client and be put on proper notice and due process requires that I can relate what the State alleges and constitutes are these alternative theories. For example, are they saying that this rib fracture that happened sometime between when the child was born and May 2nd, is that aggravated child abuse, alternative child abuse, alternative aggravated assault or alternative

reckless endangerment or are they saying that this one rib injury is aggravated child abuse and this other rib injury is aggravated child abuse and this other rib injury is aggravated child abuse. It is hard for me to defend if I don't know what count of the indictment is alleging what.

The Court: All right. I actually do appreciate your dilemma. However, [a] bill of particulars is a very . . . narrow scope. It is to adequately identify the offense charged. . . . If I agreed to your position, or agreed with your motion, the state would have to allege what the serious bodily injury was in the indictment. I don't think the law requires that to be part of the indictment in this case.

However, I did want to ask you this: Have you interviewed any of the doctors yet?

Defendant: I haven't yet, Your Honor. I wish I could take their deposition in this case, but . . . I still have to sit down with General Barnard. I don't have the x-rays. He may have them. I haven't had an opportunity to look at them. There may be some other medical records . . . I am not saying General Barnard has not given me everything he has. I am saying I don't know if he has gotten everything from all of the providers.

The state also informed the court that further medical review was required. On that basis, the court denied the defendant's motion.

It is our view that the defendant was unable to identify the acts corresponding to the charged offenses simply by reviewing partial medical records. The state attempted to remedy the situation by specifying at the last minute that the first six counts of the indictment pertained to "an occurrence," and the remaining six counts of the indictment pertained to another "occurrence." This action by the state was inadequate. The state admitted uncertainty about which act corresponded to which charged offense. Notwithstanding the defendant's collection of only part of the medical record, we find his argument that the state should be required to identify which charged offense relates to which act persuasive.[3] *See Brunelle*, 2007 WL 2026616 at *12-13. It is likely that even with receipt of the complete medical records and deposition of the state's medical experts, the defendant would have been unable to determine which act corresponded to which of the twelve

[3] We note that in *Brunelle*, the state provided a Bill of Particulars even though the indictment already specified which physical injuries were related to which charged offense, and the counts of the indictment were set out in sequential order.

charged offenses.[4] The defendant did not have the information needed for adequate preparation of his defense. Furthermore, the defendant did not have enough information to discern whether the charged offenses violated his protections against double jeopardy. *See generally Best*, 2008 WL 4367529, at *21; *see also Byrd*, 820 S.W.2d at 741. As a separate but related matter, we also note that the inadequacies presented by the indictment would have prevented the defendant from entering into any definable or meaningful guilty plea agreement had he chosen to do so. Therefore, we conclude that the court abused its discretion by failing to require the state to provide the defendant with a Bill of Particulars. In accordance with our supreme court's opinion in *Hicks*, we further conclude that this abuse of discretion constitutes reversible error.

We turn now to the interrelated issue of whether the state was required to elect offense and the trial court was required to issue a jury instruction in circumstances where the jury was asked to consider separate and distinct acts when finding guilt of a single offense. Without the state specifying which act relates to which offense, the defendant is at risk of being convicted by a partial jury in a verdict that is not unanimous. As stated:

> In those situations, such as when a child alleges some type of abuse yet cannot relate when the offenses occurred, the jury must support a verdict of guilt by unanimous decision that the defendant committed one specific offense - one juror may not convict based upon a decision that the defendant committed the offense on one date, while another juror believes the defendant committed the same statutory offense, but on a different date. Such a defendant would be convicted of different offenses, each by a partial jury.

State v. Hodges, 7 S.W.3d 609, 624 (Tenn. Crim. App. 1998). "Where the state presents evidence of numerous offenses, the trial court must augment the general jury unanimity instruction to insure that the jury understands its duty to agree unanimously to a particular set of facts." *State v. Hodge*, 989 S.W.2d 717, 721 (Tenn. Crim. App. 1998). Furthermore, our supreme court has pointed out that jury unanimity, and therefore election, may be necessary to preserve the court's role as a possible thirteenth juror:

> "[T]here should be no question that the unanimity of twelve jurors is required in criminal cases under our state constitution." *State v. Brown*, 823 S.W.2d 576, 583 (Tenn. Crim. App. 1991). A defendant's right to a unanimous jury before conviction requires the trial court to take precautions to ensure that the jury deliberates over the particular charged offense, instead of creating a "patchwork verdict" based on different offenses in evidence. When a jury is charged, as here, to elect for itself the incidents on which it will convict, the court cannot be assured of the unanimity of the

[4] We also note the trial court's suggestion in the quoted section of the pre-trial hearing that any ambiguity or uncertainty about lesser included offenses charged in the indictments could be remedied later in instructions to the jury. As is discussed subsequently, the defendant requested such an instruction prior to deliberation and the trial court denied the defendant's request, stating that if any problems arose as result of the jury's verdict, they could be resolved through merger.

> jury's verdict. Hence, when asked to function as "thirteenth juror" and assess the weight of the evidence to support the jury's verdict, the trial court cannot be certain which evidence was considered by the jury in reaching its verdict.

State v. Shelton, 851 S.W.2d 134, 137 (Tenn. 1993). This court has previously concluded that failure to issue a jury instruction on election to insure unanimity constitutes reversible error. *See Hodge*, 989 S.W.2d at 721.

In the instant case, this problem is most clearly illustrated by fact that the defendant was charged with both aggravated child abuse and aggravated child neglect. The two crimes are codified in the same statute, Tennessee Code Annotated section 39-15-402, which states:

> (a) A person commits the offense of aggravated child abuse or aggravated child neglect or endangerment, who commits the offense of child abuse, as defined in § 39-15-401(a), or who commits the offense of child neglect or endangerment, as defined in § 39-15-401(b), and:
>
> (1) The act of abuse or neglect results in serious bodily injury to the child;
>
> (2) The act of neglect or endangerment results in serious bodily injury to the child;
>
> (3) A deadly weapon, dangerous instrumentality or controlled substance is used to accomplish the act of abuse, neglect or endangerment; or
>
> (4) The act of abuse, neglect or endangerment was especially heinous, atrocious or cruel, or involved the infliction of torture to the victim.
>
> (b) A violation of this section is a Class B felony; provided, however, that, if the abused, neglected or endangered child is eight (8) years of age or less, or is vulnerable because the victim is mentally defective, mentally incapacitated or suffers from a physical disability, the penalty is a Class A felony.

In *State v. Mateyko*, our supreme court stated that "the offense of child abuse and neglect proscribed by Tennessee Code Annotated section 39-15-401(a) is a single offense that may be committed through one of two courses of conduct: child abuse through injury and child abuse through neglect." 53 S.W.3d 666, 668 n.1 (Tenn. 2001). While a single offense may be committed through two courses of conduct, this court has noted in a recent opinion that where a defendant is charged with both aggravated child abuse and aggravated child neglect, the trial court should issue a jury instruction that jurors may find the defendant guilty of one of the two charged offenses, but not both. *See State v. Vernita Freeman*, No. W2005-0294-CCA-R3-CD, 2007 WL 426710, at *9 (Tenn. Crim. App. at Jackson, Feb. 6, 2007). Specifically, the court stated:

> The determination of whether the State is preceding upon alternative theories of prosecution or upon separate and distinct crimes should be resolved at a jury instruction conference in order that the jury may be properly instructed with regard to their verdict. Obviously, if the State is proceeding upon alternative theories, the jury should be instructed that they can find the defendant guilty of one or the other of the theories, but not both.

Id. n.2. We agree with the court's statement in *Freeman*. In the instant case, the record reflects that the defendant was indicted in multiple counts under both Tennessee Code Annotated sections 39-15-401 and 39-15-402. Specifically, the defendant was indicted for two counts of aggravated child abuse, two counts of aggravated child neglect, two counts of child abuse, two counts of child neglect, two counts of aggravated assault, and two counts of reckless endangerment. The defendant requested that the trial court issue a specific jury instruction prior to deliberation. The trial court declined to issue the instruction. We believe that the trial court had an obligation to ensure that the jury was unanimous in its verdict. This instruction was especially important for two reasons. First, at least two of the charged offenses at issue derive from the same statutes and contain the same statutory elements. Second, the trial court's error was compounded by the fact that the trial court did not require the state to provide a Bill of Particulars to the defendant prior to the commencement of trial. Because the defendant had no way of knowing which alleged acts related to aggravated child abuse and which alleged acts related to aggravated child neglect during the presentation of evidence, the need for an election instruction at the close of proof was clear. Therefore, we conclude that the court's failure to issue this instruction constitutes reversible error.[5]

D. Disclosure of Evidence: Jencks and Brady Materials

As his final issue on appeal, the defendant argues that he should have been granted a new trial because the state violated the rules announced in *Jencks v. United States*, 353 U.S. 657 (1957), and *Brady v. Maryland*, 373 U.S. 83 (1963), which provide that the state must turn over recorded witness statements made to the police and supply the defendant with any favorable evidence which is material to either guilt or punishment. Specifically, the defendant argues that he was not provided with the written TBI report of Agent Smith's interview with Tammy Darnell, a written report generated by Detective Johnson during Tammy Darnell's statement to Detective Johnson, and any and all records of interviews Tammy Darnell made to social workers or agents of the Department of Children's Services.

Rule 26.2 of the Tennessee Rules of Criminal Procedure, also known as Tennessee's version of the Jencks Act, states in pertinent part:

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[5] Even though the trial court should have issued a jury instruction as suggested by the defendant, we note that the requested instruction would have only addressed the distinction between the charged offenses of aggravated child abuse and aggravated child neglect. The jury instruction at issue would not have remedied the uncertainty regarding the other charged counts in the indictment. Therefore, we conclude that the trial court should have ordered the state to provide a Bill of Particulars *and* issued the requested jury instruction. We conclude that the court's failure to remedy this problem at each stage constitutes cumulative and reversible error.

> (a) Motion for Production. After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the state or the defendant and the defendant's attorney to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter of the witness's testimony.
>
> . . . .
>
> (e) Sanction for Failure to Produce Statement. If the other party elects not to comply with an order to deliver a statement to the moving party, the court shall order that the testimony of the witness be stricken from the record and that the trial proceed, or, if it is the attorney for the state who elects not to comply, shall declare a mistrial if required by the interest of justice.

Tenn. R. Crim. P. 26.2 (a) & (e). The rule also defines a statement as:

> (1) A written statement that the witness makes and signs, or otherwise adopts or approves; or (2) A substantially verbatim, contemporaneously recorded recital of the witness's oral statement that is contained in a stenographic, mechanical, electrical, or other recording or a transcription of such a statement.

Tenn. R. Crim. P. 26.2 (f) (1) & (2). The Jencks Act allows the party who did not call the witness, to move the court to have the opposing party produce any statements relating to the subject matter of that witness's testimony. *See id*. The moving party is not entitled to receive those materials until after the witness has testified on direct examination. *Id*.

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the United States Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." A motion based upon this case compels the prosecution to disclose any evidence in its possession which may be favorable to the defendant. To prove a *Brady* violation, a defendant must demonstrate that: (1) he requested the information (unless the evidence is obviously exculpatory, in which case the state is bound to release the information whether requested or not); 2) that the state suppressed the information; 3) that the information was favorable to the defendant; and 4) that the information was material. *Johnson v. State*, 38 S.W.3d 52, 56 (Tenn. 2001). The evidence is deemed material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

The defendant argues that the state should have provided a copy of the polygraph report prepared by TBI Agent Mike Smith. The record reflects that the defendant asked for the report after

Tammy Darnell concluded her direct testimony at trial. The record also reflects that at the hearing on the defendant's motion for a new trial, the trial court determined that this report did not meet the definition of a statement under rule 26.2(f) and denied the defendant's motion. Upon review of the statement, we agree with the trial court that the report does not meet the definition of a statement requiring disclosure under Rule 26.2(f). The statement was not signed, approved, or adopted by Tammy Darnell. The report is not contemporaneous with an oral statement made by the witness. The report appears to have been prepared on May 25, 2006, more than two weeks after the polygraph test was conduct on May 8, 2006. Therefore, we conclude that the state was not obligated to disclose the report to the defendant under Rule 26.2 of the Tennessee Rules of Criminal Procedure.

Similarly, after reviewing the document generated by Detective Johnson during his interview of Tammy Darnell, we conclude that the defendant is not entitled to disclosure of this document under Rule 26.2. The document appears to be a series of notes and not a recording of a verbatim, contemporaneous oral statement by Ms. Darnell. Detective Johnson stated during the hearing on the motion for new trial that these were notes made as a reminder to check on S.L.'s health at birth. Detective Johnson also testified that Tammy Darnell prepared a written, signed statement from that same interview. This document was provided to the defendant after Tammy's testimony at trial.[6]

The defendant further argues that the state was required to disclose the results of the TBI polygraph report under *Brady v. Maryland*. However, upon review of the record, we note that the defendant failed to raise a *Brady* violation in his motion for new trial, and did not address a *Brady* violation during the hearing on his motion. Tenn. R. App. P. 3(e); *see also State v. Martin*, 940 S.W.2d 567, 569 (Tenn. 1997). The only other avenue by which we could review the alleged *Brady* violation is through plain error. However, after a cursory examination, we conclude that the defendant is not entitled to review under a plain error standard. *See generally State v. Biggs*, 218 S.W.3d 643 (Tenn. Crim. App. 2006). Therefore, the defendant is not entitled to relief as to this issue.

CONCLUSION

Based upon the cumulative errors stemming from the trial court's failure to order the state to provide the defendant with a Bill of Particulars and failure to issue a jury instruction prior to deliberation, we reverse the defendant's convictions and remand this matter for a new trial.

_____

J.C. McLIN, JUDGE

[6] We note that the defendant made a general assertion that he was also entitled to any reports generated by members of the Department of Children's Services. However, beyond making that assertion, no other discussion of the existence of those statements, what information those statements may contain, or their materiality to the defendant's case is addressed in the defendant's brief. Therefore, we decline to address the issue further.